

May 3 2010

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

JEFFREY T. RENZ
Patrick Griffin, Intern
Criminal Defense Clinic
School of Law
The University of Montana
Missoula, Montana 59812
(406) 243-5127
Attorneys for Petitioner/Appellant

FILED

MAY 03 2010

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court Cause No.

DA 10-0176

ORIGINAL

JEFFERY WEER,

Appellant,

-v-

STATE OF MONTANA,

Appellee.

**MOTION FOR RELIEF
PENDING APPEAL AND
MEMORANDUM OF
LAW**

Pursuant to Rule 22(2) Mont. R. App. P. (2009), Rule 22(1)(a)(i) Mont. R. App. P. (2009) and Mont. Code Ann. § 61-8-403(3) (2009), Petitioner, Jeffery Weer, moves this Court to restrain the Montana Department of Motor Vehicles from continuing the suspension of his driver's license pending appeal. Mr. Weer filed a timely Petition to reinstate

his driver's license with the District Court on February 1, 2010, which included a request for interim relief. The District Court denied Mr. Weer's Petition on March 10, 2010. Mr. Weer filed a notice of appeal with this Court on April 8, 2010. On April 20, 2010, Mr. Weer filed an unopposed motion to reinstate his driving privileges pending appeal under Rule 22(1)(a)(i) Mont. R. App. P., and the District Court denied the unopposed motion on April 23, 2010.

Rule 22(2) Mont. R. App. P. states that when a District Court denies a motion under Rule 22(1)(a)(i) Mont. R. App. P., that "a motion for relief from the District Court order may be filed in the Supreme Court within 11 days of the date of the District Court order." The motion must "demonstrate good cause for relief, supported by an affidavit." Rule 22(1)(a)(i) Mont. R. App. P.

Counsel for Mr. Weer has spoken with opposing counsel. Opposing counsel has advised Mr. Weer that they "do not oppose the [District] Judge's Order."

Mr. Weer's license was suspended on January 18, 2010. Counsel has spoken with court reporter Ceresse Parker and she stated that she intends to file an extension of 50 days to transmit the record to the Supreme Court. If

the extension is granted the record will not be due to the Supreme Court until July 7, 2010. Mr. Weer's license suspension expires on July 18, 2010.

Mr. Weer submits his affidavit in further support of this Motion.

MEMORANDUM OF LAW

Rules 22(1)(a)(i); 22(2), Mont. R. App. P., provide that this Court may restore or grant an injunction pending appeal. Section 61-8-403(3) states: "[u]pon request of the petitioner, the District Court may order the department to return the seized license or issue a stay of the suspension or revocation action pending the hearing."

The relief available under § 61-8-403(3) is in the form of preliminary injunctive relief. When the district court stays the suspension, it effectively enjoins the Department from suspending the license.

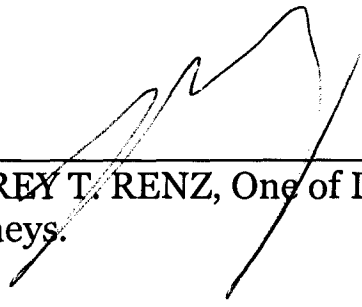
This Court should order reinstatement of Mr. Weer's driver's license pending appeal. Mr. Weer raises meritorious issues on appeal. For example, when it denied his Petition, the District Court relied on a non-citable case, Ditton v. Department of Justice, 2008 MT 256N, 210 P.3d 701 (2008), for its decision.

The facts in Mr. Weer's case fall well within the contours established

by State v. Lafferty, 291 Mont 157, 159, 967 P.2d 363, 364 (1998); and Morris v. State, 304 Mont. 114, 115, 18 P.3d 1003, 1004 (2001). The driving behavior that the defendants in Lafferty and Morris exhibited was more erratic than Mr. Weer's driving. This Court concluded that the State lacked particularized suspicion to stop the defendants in Lafferty and Morris.

WHEREFORE, Petitioner, Jeffery Weer, respectfully prays that this Court issue its order restraining the Montana Department of Motor Vehicles from continuing the suspension of his driver's license pending the outcome of this appeal and directing the temporary reinstatement of his driving privileges.

DATED: April 30, 2010



JEFFREY T. RENZ, One of Defendant's Attorneys.



PATRICK M. GRIFFIN, Intern, One of Defendant's Attorneys.

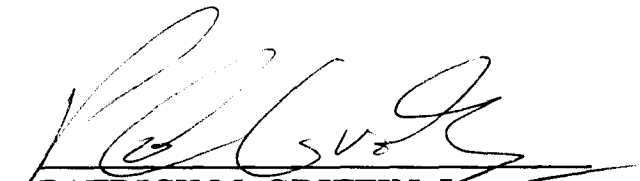
CERTIFICATE OF SERVICE

I hereby certify that I served true and accurate copies of the foregoing by mailing a copy of the same to the following by first class mail:

Steve Bullock
Montana Attorney General
215 North Sanders Street
Helena, MT 59601-4574

Missoula County Attorney
200 West Broadway Street
Missoula, MT 59802-4292

DATED: April 30, 2010


PATRICK M. GRIFFIN, Intern

JEFFREY T. RENZ
Patrick Griffin, Intern
Criminal Defense Clinic
School of Law
The University of Montana
Missoula, Montana 59812
(406) 243-5127
Attorneys for Petitioner/ Appellant

IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court Cause No.

DA 10-0176

JEFFERY WEER,

Appellant,

-v-

STATE OF MONTANA,

Appellee.

AFFIDAVIT

I, Jeffery Weer, being first duly sworn, depose and say that I am the Appellant/ Petitioner in the above-entitled case; that pursuant to Rule 22(2)(a)(i), Mont. R. App. P., the following is true:

1. I am single and I live alone in a remote area approximately 23 miles east of Bonner, Montana. I live on a dirt road; the nearest paved

highway is approximately 3 miles from my house; the nearest post office, where I receive my mail, is approximately 23 miles from my house; the nearest gas station is approximately 17 miles; the nearest grocery store is approximately 23 miles from my house; and the nearest convenience store is approximately 17 miles from my house.

2. I was a heavy equipment operator for Ed Cheff Logging from approximately 2005 until December, 2009, when I was laid off because of the Smurfit-Stone Container Mill closure. Since the mill's closure I was unemployed until April 22, 2010, when I accepted a temporary job near my house at a reduced wage. Without the ability to drive I am unable to travel to look for long term employment and I am unable to drive to and from work.

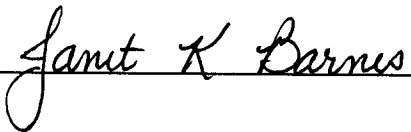
3. My inability to drive has rendered me socially isolated, I am not able to see any friends or family and I am reluctant to ask friends for rides as I do not wish to inconvenience them. I need to see my eye doctor, but I have been unable to do so because of the suspension of my drivers license. I also attend my church, which is approximately 17 miles away from my house, less frequently than when I was able to drive.

4. Without my license I will be irreparably injured.

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.


JEFFERY WEER

SUBSCRIBED and SWORN to before me this 28th day of April, 2010.





JANET K. BARNES
NOTARY PUBLIC-MONTANA
Residing at Missoula, Montana
My Comm. Expires Apr. 24, 2011

NOTARY PUBLIC, State of Montana
Residing at

My Commission Expires: _____

Jeffrey T. Renz, Esq.
Patrick Griffin, Intern
CRIMINAL DEFENSE CLINIC
School of Law
The University of Montana
Missoula, Montana 59812
(406) 243-4823
Attorneys for Appellant-Petitioner

MONTANA FOURTH JUDICIAL DISTRICT COURT, MISSOULA COUNTY

JEFFERY ALLEN WEER,

Appellant/Petitioner,

-v-

STATE OF MONTANA,

Appellee/ Respondent.

Dept. 3

No. DV-09-122

Mont. S. Ct. No. DA 10-0176

Judge: John W. Larson

**UNOPPOSED MOTION FOR
RELIEF PENDING APPEAL
(AND BRIEF)**

Pursuant to Rule 22(1)(a)(i) Mont. R. App. P. (2009) and Mont. Code Ann. § 61-8-403(3) (2009), Petitioner, Jeffery Weer, moves this Court to reinstate his driving privileges pending appeal. Mr. Weer appealed from this Court's judgment on April 8, 2010 (Supreme Court No. DA 10-0176). The State of Montana does not object to this Motion.

Mr. Weer has also moved to expedite preparation of the record. Reinstating Mr. Weer's license pending appeal would relieve the court

reporter of that burden and permit her additional time to prepare the transcript in this case.

Mr. Weer's license was suspended on January 18, 2010. Counsel has spoken with court reporter Cerease Parker and she stated that she intends to file an extension of 50 days to transmit the record to the Supreme Court. If the extension is granted the record will not be due to the Supreme Court until July 7, 2010. Mr. Weer's license suspension expires on July 18, 2010. Mr. Weer has contemporaneously filed a Motion for Reduction of Time for Transmission of the Record by the District Court.

Rule 22(1)(a)(i) Mont. R. App. P. states that "a party shall file a motion in the district court . . . to stay . . . a[n] order of the district court pending appeal, . . . [or] . . . for an order . . . restoring or granting an injunction pending appeal." Section 61-8-403(3) states: "[u]pon request of the petitioner, [this] [C]ourt may order the department to return the seized license or issue a stay of the suspension or revocation action pending the hearing." Reading the two together, it appears that relief pending appeal may be granted as well. An order directing reinstatement of a suspended license pending litigation is, for all practical purposes, a temporary injunction.

Mr. Weer's appeal raises meritorious issues. For example, this Court

relied on a non-citable case, Ditton v. Department of Justice, 2008 MT 256N, 210 P.3d 701 (2008), for its decision. Ditton was also distinguishable. There were facts about driving behavior in Ditton in addition to those that resembled Mr. Weer's driving behavior.

Finally we think that State v. Lafferty, 291 Mont 157, 159, 967 P.2d 363, 364 (1998) or Morris v. State, 304 Mont. 114, 115, 18 P.3d 1003, 1004 (2001), will provide the governing rule because the driving behavior in those cases was more erratic than that described in Mr. Weer's case and the Supreme Court nevertheless found that the stops in those cases was unreasonable.

WHEREFORE, Petitioner, Jeffery Weer, respectfully prays that this Court issue a stay of the suspension action pending appeal.

DATED: April 20, 2010

JEFFREY T. RENZ, One of Defendant's
Attorneys.

PATRICK M. GRIFFIN, Intern, One of
Defendant's Attorneys.

CERTIFICATE OF SERVICE

I hereby certify that I served true and accurate copies of the foregoing
by delivering a copy of the same upon the following:

Missoula County Clerk of District Court
200 West Broadway Street
Missoula, MT 59802-4292

Cerese Parker, Court Reporter
200 West Broadway Street
Missoula, MT 59802-4292

Paul Nicol, Intern
Missoula County Attorney
200 West Broadway Street
Missoula, MT 59802-4292

Steve Bullock
Montana Attorney General
215 North Sanders Street
Helena, MT 59601-4574

DATED: April 20, 2010

JEFFREY T. RENZ

FILED APR 23 2010

SHIRLEY E. FAUST, Clerk
By Debra T. Hart Deputy

John W. Larson, District Judge
Fourth Judicial District Dept. 3
Missoula County Courthouse
Missoula, Montana 59802
406-258-4773

Debra T. Hart
John W. Larson
Pls. Strictly
4/23/10

MONTANA FOURTH JUDICIAL DISTRICT COURT, MISSOULA COUNTY

JEFFERY ALLEN WEER,

Appellant/Petitioner,

-v-

STATE OF MONTANA,

Appellee/ Respondent.

Dept. 3

No. DV-¹⁰~~09~~-122

Mont. S. Ct. No. DA 10-0176

Judge: John W. Larson

**ORDER REINSTATING
LICENSE PENDING
APPEAL**

Petitioner and Appellant Jeffery Weer moved this Court to reinstate his driving privileges pending appeal. The State does not object. Mr. Weer appealed from this Court's judgment on April 8, 2010.

IT IS ORDERED:

The Montana Division of Motor Vehicles shall reinstate Jeffery Weer's driving privileges pending the outcome of his appeal in Case No. DA 10-0176.

DATED:

JOHN W. LARSON, District Judge